Supreme Court, U.S.
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No. 95-1765

In The

Supreme Court of the United States

October Term, 1995

DAN CHASE TAXIDERMY SUPPLY CO., INC., *et al.*,

Petitioners,

vs.

SUPERIOR FORM BUILDERS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent adopts the Questions Presented set forth in the Petition for Writ of Certiorari.

STATEMENT PURSUANT TO RULE 29.6

Superior Form Builders, Inc. has no parent companies or nonwholly owned subsidiaries.

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CORRECTION OF MISSTATEMENTS IN OPINIONS BELOW

The Petitioner ("Chase") mistakenly sets out in its Appendix (Pet. App. 42a) the original decision of Judge Smith which contains a typographical error. The last sentence of the second paragraph on Pet. App. 45a reads "In short, considerations of compensation and deterrence *do not* justify an award of attorneys' fees in this case." By letter of September 19, 1994, Judge Smith sent to Counsel a re-typed page 4 of her Opinion and asked that it be substituted for the original page 4. The substituted version states: "In short, considerations of compensation and deterrence *justify* an award of attorneys' fees in this case." The parties then filed a joint stipulation with the Court of Appeals pursuant to Rule 10(e) correcting the Appendix in that regard. The reported decision granting Respondent's ("Superior") petition for award of attorney's fees sets forth the corrected version of the District Court's opinion. *Superior Form Builders v. Dan Chase Taxidermy Supply Co., Inc.*, 881 F. Supp. 1021, 1025 (E.D. Va. 1994), *aff'd*, 74 F.3d 488 (4th Cir. 1996).

STATEMENT OF THE CASE

The Respondent adopts the Statement of Jurisdiction and the description of the statutes involved in the Petition for Writ of Certiorari.

On September 14, 1993, Superior Form Builders ("Superior") filed a Complaint alleging that Dan Chase Taxidermy Supply Company, Inc. and Dan Chase (collectively "Chase") infringed on four taxidermy forms that had been registered pursuant to the copyright laws. Superior sought equitable relief, statutory damages and attorneys' fees and costs. On March 25, 1994, Chase moved for summary judgment on the grounds that the forms were not copyrightable. Superior

opposed the motion and on May 10, 1994, the District Court properly denied Chase's motion for summary judgment and entered summary judgment for Superior on the issue of copyrightability.

A jury trial was held in the United States District Court beginning on May 12, 1994 and ending on May 17, 1994. Pursuant to a special verdict form, the jury returned a verdict finding that Chase willfully infringed on all four forms at issue. The jury awarded the maximum statutory damages of $100,000 on each form for a total of $400,000.

The District Court entered a Temporary Restraining Order against Chase on May 17, 1994 and judgment on the jury verdict was entered on the same day. An order extending the Temporary Restraining Order was entered on May 26, 1994.

On June 1, 1994, Chase filed a motion for a new trial which was denied by the court in a Memorandum and Opinion Order dated August 5, 1994. On September 2, 1994, Chase filed a notice of appeal. On September 16, 1994, the District Court entered a judgment against Chase for costs and attorneys' fees in the amount of $74,104.50, pursuant to a Memorandum Opinion and Order. On September 23, 1994, the District Court entered an order granting Superior Form Builders permanent injunctive relief. On September 23, 1994, Chase filed an Amended Notice of Appeal covering all of the orders and judgments of the District Court.

On Appeal, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision in its entirety. Chase filed a motion for stay of the mandate and the Court of Appeals denied that motion. (Resp. App. 1a). Chase then filed a motion for reconsideration and for recall of the mandate. Again the Court of Appeals denied the motion for reconsideration and for recall of the mandate. (Resp. App. 3a).

STATEMENT OF FACTS

Superior Form Builders, through its owner and president, Tommy Knight, is in the business of creating and marketing taxidermy forms which are used for the mounting of animal skins. As of the date of trial, the company had been in existence for approximately three (3) years. The creation of the mannequins is a painstaking and time consuming process that involves both field research of animals in their natural habitat and sculpting skills on the part of Mr. Knight. The mannequins at issue are the original creations of Mr. Knight and the copyrights are assigned to his company Superior Form Builders. The poses and attitudes of the mannequins in question are the original products of Mr. Knight's research and artistic skill.

Superior's president, Tommy Knight, only has an eighth grade education but he creates these forms using traditional sculpturing techniques. Using a carcass cast as a model, Knight makes an armature on which to hold clay and then molds out of the clay a sculptured model of the desired animal with precise anatomical features. A mold is then made of the sculpture and forms of the sculpture are then reproduced in polyurethene.

The unadorned sculptures made by Knight have been entered into art contests. One of the forms, which is the subject matter of this suit — the deer form — won Honorable Mention in an art contest in Wakefield in the sculpture division. Other sculptures have won awards in other contests.

The four sculptures which are the subject matter of this suit all have been registered with the copyright office and have been awarded copyrights. All of the forms are legibly stamped with the copyright insignia and inform purchasers that the forms are copyrighted.

Dan Chase ordered the four forms at issue from Superior using a false name to mislead Superior as to who was actually purchasing its products. Chase then took the mannequins, copied them, placed them in his catalog for sale, removed Superior's notice of copyright and affixed a false copyright notice of his own.

Dan Chase, is the president and chief executive officer of Dan Chase Taxidermy Supply Company, Inc. (Dan Chase Taxidermy). From an educational standpoint, Mr. Chase is close to obtaining his Ph.D. Unlike Superior, which only offered for sale approximately eleven forms in 1991-92, Dan Chase Taxidermy bills itself as the largest taxidermy supply company in the world. By Mr. Chase's estimate, he offers over 3,000 forms for sale. He has been in the business twenty-seven years and he considers himself a millionaire. Mr. Chase's company had sales of approximately $2,750,000 in 1991 and $2,718,000 in 1992.

The four forms in question were displayed in Superior's first catalogue, the 1991-92 edition. This catalog came out in December 1991. In January of 1992, the plaintiff received an order from Tolbert's Taxidermy, Route 3, Box 72B, Jonesville, LA. The order was for the four forms which are the subject matter of this litigation. Superior sent the forms C.O.D. to Tolberts. In reality, there is no Tolbert's Taxidermy. Route 3, Box 72B, Jonesville, LA is the home of Dan Chase and Lilly Chase. As admitted by Dan Chase, one of his employees, Joyce Spinks, signed a UPS slip for the receipt of the forms sent by Superior Forms to Tolbert's Taxidermy.

Chase admitted that he directed his employees to order the forms in Tolbert's name because if he had used his real name, he doubted individuals, such as Knight, would send the forms to him. Chase further admitted that he has directed employees to

order forms from other companies under fictitious names. In fact, even after the present litigation commenced, Chase had his sister Martha Moss, who lives 140 miles from him, order three other forms from Superior.

Prior to ordering the forms which are the subject matter of this dispute, Chase admitted that he did not offer in his catalogues similar forms to the ones ordered from Superior. In point of fact, these forms do not appear in the 1991-92 Dan Chase Taxidermy Supply Company catalogue or previous catalogues. The Chase 1992-93 catalogue, however, was printed in October of 1992, approximately ten months after Chase ordered the forms from Superior. Substantially identical forms to the Superior's forms are offered in the 1992-93 and subsequent catalogues.

At trial and in his brief, Chase admitted that he "utilized" the forms purchased from the plaintiff in making molds that he sells to the public. In the opinion of Tom Knight and his expert, Ralph Garland, the forms sold by Chase are substantially similar, and in some cases almost identical, to the forms sold by plaintiff. In fact, Mr. Knight demonstrated to the jury by way of measurement and comparison the extent of the similarities.

Although Chase takes the position that Superior's forms are not subject to copyright, Chase had no hesitation in placing his own copyright sign on the forms that he copied from Superior. All of the Dan Chase forms which are alleged to be copies of Superior's copyrighted forms, bear the name Dan Chase, with a copyright insignia and the date of the alleged copyright. Moreover, all of Dan Chase's catalogues state on the order information page that "each mannequin in this catalogue is legally copyrighted according to the law of the United States of America and any infringement will be vigorously prosecuted".

Chase admitted that his intent in warning purchasers that his forms are copyrighted was to "bluff" people into thinking his forms are copyrighted. He further admitted and stipulated in the pretrial order that none of his forms are copyrighted according to the laws of the United States.

Ironically, despite his protest that it is not illegal to copy Superior's forms, Chase takes the moral "high-road" in warning his purchasers of "copycats". As noted in one of his catalogues, Chase warns purchasers to:

"BEWARE OF LOOK-A-LIKES!"

> Practically everyone recognizes the fact we are being copied by the desperate "copy cats" working overtime in an attempt to deceive the public and violate the rights of others.

Chase and his company are no strangers to the world of copyright infringement. In 1989, Chase and his company were sued by Sportsmen On Film, Inc. for copyright infringement. That suit alleged that Chase purchased copyrighted tapes from Sportsmen On Film, Inc., erased the name, substituted the name of Dan Chase and falsely packaged and labeled the videos with the copyright notice indicating that Dan Chase was the owner of the copyright of those tapes. Chase admitted that this was done. According to him, the company made an innocent mistake and neither he nor his company really contested the lawsuit and eventually settled it.

In 1987, Chase also was sued by Jonas Brothers, a taxidermy supply company, for copyright infringement. Chase settled that case. He has also been accused by at least three other people in the industry — Joe Kish, Ivan Harvey and Dennis Middleton — of illegally copying their forms. He was also sued in the United

States District Court for the Northern District of New York by eleven (11) plaintiffs who alleged almost the exact same thing that Superior alleges against the defendants, that is, copyright infringement of taxidermy forms.

Chase incorrectly states in his Statement of Facts that "it is undisputed that Chase did not copy the surface features of SFB's mannequins." At trial of this matter, Superior's President Knight and Superior's expert compared Chase's mannequins with Superior's mannequins. The jury had the opportunity to view physical dimensions, width, length, size, shape, etc. In some instances the mannequins were almost identical and the surface features were the same.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT AND APPEALS COURT WERE CORRECT IN HOLDING THAT THE TAXIDERMY MANNEQUINS WERE NOT USEFUL ARTICLES.

In the case at hand, Superior's experts and witnesses testified the animal forms are displayed as pieces of art and are shown, without skins, in art museums and museums of natural history. There is no question that the forms are also used in the taxidermy profession for purposes of mounting animal skins. Moreover, there is no question that the final mounted animal is copyrightable. *Kamar Int'l, Inc. v. Russ Berrie and Co.*, 657 F.2d 1059 (9th Cir. 1981); *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503 (9th Cir. 1987). In fact, Chase admitted in argument before the trial court that the final mounted animal is a piece of art.

The mounted animal has no function other than to portray

the appearance of the animal. It is either hung on the wall or stood in the corner. Likewise, the sculptured forms serve no purpose other than to portray the appearance of the animal. Taxidermists buy these forms because of the way they look and because of their realism and accuracy.

One of Superior's experts, Dennis McElvain, stated that taxidermists are attracted by the "artistic impression of that animal" when they purchase a form. If the taxidermist likes the "position" or if he likes "what the artist has created in terms of his knowledge of anatomy and position," then he will "purchase that".

In *Masquerade Novelty v. Unique Indus.*, 912 F.2d 663 (3rd Cir. 1990), the court addressed the issue of the copyrightability of animal nose masks. The defendant argued, as does Chase, that the mask had a utilitarian purpose in that they "allowed a person to create humor by masquerading in an animal's nose." *Id.* at 664.

The Third Circuit reversed, noting that almost any creation can be found to be a useful article if the definition is stretched far enough. *Id.* The court went on to hold that the masks were not useful articles because they had no utility that did not derive from their appearance.

Chase focuses on the fact that the mannequins serve the mechanical function of supporting an animal skin and facilitating the taxidermy mounting process. Chase argues that the District Court and Court of Appeals ignored the mannequins inherent utilitarian purpose and focused on the nature of the finished product.

A work of art that has been afforded copyright protection is not deprived of its protected status merely because it is substantively put to functional use. *Mazer v. Stein*, 347 U.S. 201,

74 S. Ct. 460, 98 L. Ed. 630 (1954). As the Court of Appeals correctly stated:

> In this case, Chase argues that Superior Form's animal mannequins have the utilitarian function of acting as mounts for animal skins for display. But this argument overlooks that which distinguishes mannequins from ordinary plastic foam pellet animal stuffing: A mannequin provides the creative form and expression of the ultimate animal display, whereas pellets do not. Even though covered with a skin, the mannequin is not invisible but conspicuous in the final display. The angle of the animal's head, the juxtaposition of its body parts, and the shape of the body parts in the final display is little more than the portrayal of the underlying mannequin. Indeed, the mannequin can even portray the intensity of flexed body parts, or it can reveal the grace of relaxed ones. None of these expressive aspects of a mannequin is lost by covering the mannequin with a skin. Thus, any utilitarian aspect of the mannequin exists "merely to portray the appearance" of the animal.

See 17 U.S.C. § 101. 74 F.3d 488, 493-94. (Pet. App. 24a).

II.

THE APPEALS COURT DID NOT FAIL TO CONDUCT A SEPARABILITY ANALYSIS.

Chase incorrectly states that the Court of Appeals "failed to conduct a separability analysis and thus concluded that taxidermy mannequins used for the mounting of animal skins are copyrightable." Relying on the Second Circuit's separability analysis in *Brandir Int'l Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2nd Cir. 1987) and *Kieselstein-Cord v. Accessories By Pearl, Inc.*, 632 F.2d 989 (2nd Cir. 1980), the Court of Appeals specifically held that to the extent that an argument can be made that the mannequins performed a utilitarian function by supporting the mounted skins "we believe the function to be conceptually separable from the work sculptural features." 74 F.3d at 494. (Pet. App. 25a).

III.

THE COURT OF APPEALS DECISION DOES NOT CREATE A SPLIT AMONG THE CIRCUITS IN THE INTERPRETATION AND APPLICABILITY OF THE COPYRIGHT ACT.

Chase argues that the Fourth Circuit rejects the reasoning annunciated by the Second Circuit in *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2nd Cir. 1985). Accordingly, Chase argues that a split exists among the Circuits which requires review by this Court.

The *Barnhart* case is distinguishable from the present case in several important factual areas. First, it was conceded in *Barnhart* by all of the parties that the mannequins were useful articles. *Id.* at 414. Moreover, there was no question that the

mannequins were used to display clothing and that clothing has universally been held to be a useful article not subject to copyright. *Whimsicality, Inc. v. Rubie's Costume Co., Inc.*, 891 F.2d 452, 455 (2nd Cir. 1989).

Unlike the situation in *Barnhart*, where neither the mannequins nor the clothing were found to be copyrightable, there is no question the final mounted animal is copyrightable. *Kamar Int'l Inc., supra; Rachel v. Banana Republic Inc., supra.* In fact, as noted above, Chase stipulated that the final mounted animal is a copyrightable piece of art.

In *Barnhart*, the court was faced with headless, limbless, human torsos made of styrene that were used to display clothes. The torsos were not anatomically correct in that they had hollow back designed to hold excess fabric. The court held that the styrene torsos were mainly designed to display clothes and had no aesthetic features that were separate from that utilitarian function.

Discussing *Barnhart*, the District Court below correctly stated that there is a "conceptual difference between human mannequins used to display various articles of clothing on a temporary basis and animal forms that are used permanently to mount skins. The finished product in this case is unquestionably a permanent artistic object, while a generic, dressed human mannequin is a changeable advertisement." 851 F. Supp. at 224. (Pet. App. 87a).

The Court of Appeals also noted that *Barnhart* was distinguishable in significant respects. The only indication that the Court of Appeals disagreed with *Carol Barnhart* was couched in the following hypothetical situation:

> While we believe that *Carol Barnhart* is thus

> distinguishable in significant respects, to the extent that it might be construed as leaving unprotected an author's mode of expression fixed in a tangible medium for the purpose of betraying that expression, we would disagree with its holding.

74 F.3d at 494. (Pet. App. 26a).

In summary, for Chase to argue that there "is no meaningful or principal manner in which these two decisions may be distinguished or reconciled" begs the question. The *Barnhart* decision is clearly distinguishable from the case at hand. Accordingly, no conflict exists.

IV.

THE MERGER DOCTRINE WAS ADEQUATELY HANDLED BY CHASE'S OWN INSTRUCTION ON THE ISSUE.

Chase argues that the merger doctrine bars copyright protection for taxidermy mannequins in the instant case and further states that the Fourth Circuit has granted Superior a monopoly of the idea of its animal mannequins "free from the conditions and limitations imposed by applicable law." *Citing Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971), Chase argues that the Fourth Circuit failed to make the critical distinction between "idea and expression" thereby allowing Superior to have a virtual monopoly of the idea of its animal mannequins.

Chase adequately addressed the merger doctrine at trial by offering an instruction to the jury which gave the jury the opportunity to find for Chase on the issue of merging an idea and its expression:

> When reproduction of a life-like object is at issue, the plaintiff must prove substantial similarity to those aspects of the work that are an expression not required by the idea. In determining substantial similarity, to the extent that works are similar in ideas and general concepts, the similarities are non-infringing. Furthermore, even similarities and expression are non-infringing when the nature of a creation makes sub-similarities necessary. Such indispensable expression of ideas may be protected only against virtually identical copying.

Accordingly, the jury had full opportunity to make visual comparisons of the mannequins to determine if there was virtually identical copying. In addition to expressions, the evidence presented to the jury also had to do with physical dimensions, width, length, size, shape, etc. This was more than mere expression. This entailed comparing physical dimensions of Chase's and Superior's forms which in some instances were identical.

In the face of uncontradicted evidence that Chase attempted to monopolize the forms he sold — by falsely warning suppliers, taxidermists and customers that his forms were copyrighted — Chase now argues to this Court that public policy requires a finding that Superior's taxidermy forms are not copyrightable.

The District Court below resolved this issue by stating:

> Defendants also argue that allowing plaintiff to copyright these forms would give it a " 'virtual monopoly' in the taxidermy supply business and would amount to allowing the

copyright of an idea." This argument clearly fails. Copyright law does not protect ideas; it only protects the specific expression of those ideas (citations omitted). In other words, plaintiff cannot prevent others from creating a raccoon or a deer "from scratch" from their own ideas in the same pose plaintiff has used — plaintiff can only prevent others from copying its forms. At trial, plaintiff will have the burden of proving that the similarities are not coincidental, but come from copying. "Absent copying there can be no infringement of copyright." (citations omitted). No monopoly will be created by recognizing the validity of copyrights in this case.

851 F. Supp. at 224. (Pet. App. 89a).

If Chase's arguments on monopoly were valid, no one could copyright a statute or any other piece of art displayed in any medium. The idea of a leaping deer is not copyrightable but a sculpture of that deer certainly is.

Superior does not contend that some other sculptor cannot create a form of a raccoon, deer, etc. Wildlife has been the subject of artistic expression for countless years and will no doubt continue to do so. The copyright law and public policy, however, protects honest persons who want to express themselves artistically, regardless of subject matter. The law only restrains those who willfully copy and profit from the work and talent of others.

V.

THE COURT OF APPEALS PROPERLY RULED THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEYS' FEES.

Chase does not question the reasonableness of the attorneys' fees awarded by the District Court but submits that the Court of Appeals erred in not finding that the District Court abused is discretion in awarding attorneys' fees. The Court of Appeals noted Chase's history and the inconsistent positions that he has taken over the years. At the same time that he contended that animal mannequins are not copyrightable, Chase falsely affixed his own copyright notices to copied mannequins and warned others that his mannequins were legally copyrighted and "any infringement would be vigorously prosecuted." Given his wholesale disregard of the copyright laws and his troubled past with copyright litigation, the District Court concluded that Chase's conduct was "outrageous" and that considerations of "compensation and deterrence justify an award of attorneys' fees" in this instance. The Court of Appeals concluded that the District Court's finding was amply supported. Accordingly, the Appeals Court was correct in holding that the record supported the District Court's decision to award attorneys' fees and costs.

CONCLUSION

The Respondent respectfully submits that this case presents no issue of law or fact that justifies review by the United States Supreme Court. The Petitioner has had this record properly reviewed both at trial court and the appellate court levels. The Respondent respectfully submits that the decisions of these courts are proper and the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED FEBRUARY 20, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-2139
(CA-93-940-N)

SUPERIOR FORM BUILDERS,

Plaintiff - Appellee,

versus

DAN CHASE TAXIDERMY SUPPLY COMPANY, INCORPORATED; DAN CHASE,

Defendants - Appellants,

and

LILLY CHASE,

Defendant.

ORDER

Appellants have filed a motion for stay of mandate pending application to the United States Supreme Court for writ of certiorari.

The Court denies the motion for stay of mandate.

Appendix A

For the Court - By Direction

/s/ Bert M. Montague
Clerk

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED APRIL 23, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-2139
CA-93-940-N

SUPERIOR FORM BUILDERS

Plaintiff - Appellee

v.

DAN CHASE TAXIDERMY SUPPLY COMPANY, INCORPORATED; DAN CHASE

Defendants - Appellants

and

LILLY CHASE

Defendant

ORDER

Appellant has filed a motion for reconsideration of the denial of its motion to stay the mandate and for recall of the mandate and the appellee has filed a response in opposition.

The Court denies the motion for reconsideration and for recall of the mandate.

Appendix B

For the Court

/s/ Bert M. Montague
CLERK